No. 82-584

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IN THE

Supreme Court of the United States

October Term, 1982

E. W. JONES, Superintendent,

Petitioner,

against

FELIX RAMIREZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the conflicting decisions of the United States Courts of Appeals applying this Court's holding in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), should now be resolved.

2. Whether the jury charge, read as a whole and in view of its repeated stress upon the reasonable doubt standard, more than adequately emphasized the prosecution's burdens of proof and persuasion, and thus in no way deprived respondent of due process or a fair trial, despite incidental use of language condemned in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

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Preliminary Statement

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner E. W. Jones seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order and judgment granting respondent's petition for a federal writ of habeas corpus.

In his single-point petition for a writ of habeas corpus, respondent claimed that his conviction for Manslaughter

in the First Degree was obtained in violation of due process of law, as enunciated in this Court's decision in *Sandstrom* v. *Montana*, 412 U.S. 510 (1979), in that the trial court's "natural and probable consequences" charge concerning intent impermissibly shifted the burden of proof.

Since this Court's decision in *Sandstrom, supra*, the United States Courts of Appeal have diverged markedly in their interpretations and applications of the holding of that case, and have already rendered a number of decisions in conflict with each other. Coherence of federal jurisprudence therefore requires that a writ of certiorari issue not only to resolve the conflict among the Circuits, but also to review the Second Circuit's application of *Sandstrom* to the instant case.

Opinions Below

The opinion of the Court of Appeals, which is reported at 683 F.2d 712 (1982), is set forth in Appendix A, *infra*. The opinion of the United States District Court for the Southern District of New York, which is reported at 530 F. Supp. 345 (1981), is set forth in Appendix B, *infra*.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

Constitutional Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

Statement of the Case

A. State Proceedings

1. The Indictment

By Indictment No. 2682/76, filed December 8, 1976, the Grand Jury of Bronx County charged respondent with Murder in the Second Degree and Criminal Possession of a Weapon in the Fourth Degree.

2. The Trial

a. The People's Case

One week before the death of Estaban (a.k.a. "Smokey") Casilla on November 11, 1976, his female companion and roommate, one **Maria Ramirez**, saw respondent in the La Revancha Social Club in the Bronx. (Maria had formerly lived with respondent as his common-law wife from 1971 until 1972.) Respondent approached Maria, and when an argument ensued, they went outside the club, where respondent "smacked" her three times and hit her against a sign pole. In return, Maria took off her shoes and hit respondent on the forehead, cutting him. As the fight continued, Smokey appeared and began "tussling" with re-

spondent, who ran away. Respondent returned a few minutes later with two police officers, who told Maria they were looking for someone who had robbed respondent and beaten him up. After talking with Maria, the officers got into their patrol car, leaving respondent by himself (M. Ramirez: T. 18-23, 32-35).*

Maria next saw respondent one week later at approximately 7:30 p.m., on November 11, 1976, when he approached her again at the La Revancha Club and asked her where Smokey was. Maria left the club and went to the house of Smokey's sister, followed by respondent. There, she told Smokey, his brother Santana, and his friend "Tito" that respondent "was armed and not alone," whereupon Smokey ran out of the apartment with Tito (M. Ramirez: T. 23-25, 37-38).

Reynaldo Del Valle ("Cano") and **Leonard Lopez** were walking along the street when they saw Smokey, Santana and Tito coming out of the building. Tito was carrying a crowbar or police lock bar, and Cano was carrying a cane. Together the five men went to the social club, where Smokey and respondent began arguing "over a woman."** Respondent placed his right hand inside the left flap of his coat pocket, then pulled it out again. Smokey turned to remove his jacket, passing it to Cano. While Smokey's body was still turned, respondent again placed his right hand into the left flap of his coat, pulled out a knife and

* Numerical references preceded by "T" refer to minutes of the trial, dated March 20-31, 1978.

** Del Valle was "not sure" respondent was Smokey's assailant (T. 96), but he was certain that the man the police arrested at the scene was the man who had stabbed Smokey (T. 101). Moreover, Lopez positively identified respondent (T. 128).

stabbed Smokey in the chest area, mortally wounding him (Del Valle: T. 94-101; Lopez: T. 126-30, 144-47). The time sequence was such that Cano, who had turned to put down Smokey's jacket, did not see the actual stabbing, although he did see the knife in respondent's hand (Del Valle: T. 113). Smokey did not have a weapon (Del Valle: T. 98; Lopez: T. 132).

After the stabbing, Tito swung at respondent with the crowbar and Cano swung at him with his cane, hitting him on the shoulder (Del Valle: T. 99-100). Respondent circled like a caged animal, moving the knife in a lateral fashion parallel to the ground (Lopez: T. 130-31). In the meantime, Lopez rushed Smokey to Lincoln Hospital. Police Officers **Ernest Fleming** and **Gregory Hubner**, on foot patrol in the area, responded to screams that someone had been stabbed. Running to the social club, they drew their revolvers and ordered respondent to drop his knife, which he did. Respondent had to be restrained while Officer Fleming attempted to handcuff him and the crowd of about 25 people "surged" over him, and the officers had to call additional police units to the scene to assist them in their arrest (Fleming: T. 62-64; Hubner: T. 79-81).

After he arrived at the 42nd precinct, and after he had been treated for an arm injury at the hospital, respondent voluntarily made a statement to Detective **Daniel Danaher.** He stated that he had been approached by a group of youths, at least one of whom had robbed him on a previous occasion. They had sticks and bats and one of them said to him, "you want the same thing I gave you last time,"

referring to a beating he had received. When respondent was informed, toward the end of his statement, that Smokey had died, he said in English, "Good, that's what I wanted to do" (Danaher: T. 160-62).

Respondent then voluntarily made a statement to Assistant District Attorney **Edwin Knauer**. Essentially repeating his statement to the detective, respondent added that Smokey was the man who had robbed him on the previous occasion, that he (respondent) had previously threatened to "get even" with Smokey, that he stabbed Smokey when Smokey raised a police lock bar, and that his arm was broken by a police officer who hit him with a nightstick (Knauer: T. 205, 207-08). Respondent denied knowing that Maria was living with anyone and denied ever having seen her with Smokey or ever having argued with Smokey over a woman (Knauer: T. 205-12).

Deputy Chief Medical Examiner **Michael Baden** testified that the cause of death was a single stab wound between the chest and abdomen which penetrated four to five inches, cutting the liver and the heart and causing extensive internal hemorrhaging and bleeding.

b. The Defense

Respondent took the stand and testified that on October 30, 1976, he went to La Revancha Social Club, where he saw Maria Ramirez but did not speak with her. Leaving the club, he was robbed by three men, whom he had never previously seen. While two of them held him by either arm, a man whom he later found out was Smokey punched him in the nose and struck him repeatedly, then took his money,

his watch, and a chain with a ring and a medal on it (F. Ramirez: T. 288-91).

Respondent did not see his assailants again until November 11, 1976, when he recognized Smokey carrying a police lock bar, at the head of a group of five men who were carrying sticks and canes. Smokey told respondent, who was surrounded, that they were going to do to him the "same thing" they had done to him the first time. Smokey stepped close and swung the crow bar at respondent, who ducked, pulled a knife and stabbed Smokey (F. Ramirez: T. 300-04).

Respondent testified he had his knife in his pocket, holding it by its handle because he was "scared" and "nervous" about being surrounded. He pulled out his knife and stabbed Smokey not with the intention of killing him, but of defending himself (F. Ramirez: T. 308, 320, 322).

Respondent asserted he had acted alone and that Maria Ramirez had lied on the stand, and he denied telling Detective Danaher that he intended to kill Smokey (F. Ramirez: T. 331, 325-27, 343).

c. The People's Rebuttal Case

The People called respondent's sister, also named **Maria Ramirez**. She testified that she saw the other Maria Ramirez and respondent argue inside the social club on October 30, 1976, and that their argument continued outside (M. Ramirez [sister]: T. 367).

On November 11, 1976, the witness was at the social club with the other Maria Ramirez when respondent, his brother

Julio, and his friend Papo came in. Respondent told Maria Ramirez to "go get your guys," which she did. The witness told Papo to take him away. When Smokey arrived at the club, and before the fight started, the witness left the scene (M. Ramirez [sister]: T. 351-53, 368-69).

Finally, Maria Ramirez had given the witness, for return to respondent, a Sagittarius medallion that she had found after the October 30 fight involving respondent, Smokey, and herself (M. Ramirez [sister]: T. 354).

d. The Court's Charge

At the conclusion of the evidence, the court instructed the jury, in pertinent part, as follows:

> Let me now define this word intent for you.
>
> *A person is presumed to intend the natural and probable consequences of his acts.* Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. *A criminal intent may be inferred from all the circumstances of the case.* It need not be established by direct proof to constitute the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. *The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed rests upon the Prosecution to establish by evidence beyond a reasonable doubt.* So where *the law requires that the People must establish a specific or certain intent* on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct

proof of an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, *you then are to determine the intention of the perpetrator at the time.*

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts. The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind, and its physical manifestation of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained. A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. (T. 520-523) [emphasis added]

* * *

Here there is no statutory or legal requirement that premeditation or deliberation be present for one to be proven guilty of Murder in the Second Degree. All that the *People are required to prove beyond a reason-*

> *able doubt is that the defendant formed an intent* to kill a human being and pursuant to that intent unlawfully caused the death of that person (T. 524) [emphasis added]

Defense counsel made no objection to these instructions, nor to the charge of self-defense, which was as follows:

> Now, members of the jury, the heart of the defense in this case is one of the justification or as it is commonly known self-defense. *Here the Prosecution has the burden of proving beyond a reasonable doubt* that this defendant's act or acts were not justified. (T. 529) [emphasis added]

In the entire charge, which encompassed 31 pages of transcript, the trial court alluded to and explained the nature and importance of the reasonable doubt standard—and the role and responsibility of the jury in assessing such doubt—no less than 40 times.

3. Verdict and Sentence

On April 2, 1978, after approximately seven hours of deliberation, the jury returned a verdict acquitting respondent of second degree murder but finding him guilty of manslaughter in the first degree. On May 4, 1978, respondent was sentenced to an indeterminate period of imprisonment with a minimum of five and a maximum of fifteen years.

4. Appellate Proceedings

Before the Appellate Division, First Department, of the New York State Supreme Court, respondent argued that, since his state of mind was the sole question for the jury, the above-quoted portion of the charge unconstitutionally shifted the burden of proof as to intent and thereby

deprived him of due process of law. In a 3-2 decision (which ignored the District Attorney's "procedural bar" argument and addressed itself solely to the merits), the majority of the First Department disagreed and concluded that, read as a whole, the charge was merely permissive and properly "stressed the obligation of the prosecution to establish intent beyond a reasonable doubt."

Leave to appeal to the New York Court of Appeals was soon denied, and respondent subsequently sought review of the charge issue in a single-point petition for a federal writ of habeas corpus.

B. Federal Proceedings

On February 9, 1981, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming that the trial court's charge to the jury had impermissibly shifted the burden of proof, in violation of federal due process standards.

By opinion and order dated November 16, 1981, the United States District Court for the Southern District of New York (*Motley*, J.) accepted respondent's argument, granted the writ, and directed that respondent be released unless retried within sixty (60) days of the date of the order.

On December 7, 1981 the State filed a notice of appeal from the District Court's order, and on December 18, 1981 its application for a stay pending appeal was granted by that court.

On June 30, 1982, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court granting the writ of habeas corpus.

Reasons for Granting the Writ

The divergent methods employed by the federal courts of appeals in analyzing *Sandstrom* errors and considering remedies therefor have led to such disparate results that this Court's guidance is required in order to resolve existing conflicts among the circuits and to provide future assistance to state and federal courts in properly defining and allocating burdens of proof in jury instructions.

Since this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), the federal courts of appeals have assessed *Sandstrom* errors in different and often conflicting ways. Under any of the standards, policies, or methods of analysis which the circuit courts employ, however, the charge to the jury in the instant case would not be viewed as having deprived respondent of due process of law.

A. First Circuit Analysis

When faced with an ostensible *Sandstrom* violation, the First Circuit focuses its analysis on the alleged burden-shifting language itself, and then considers the charge as a whole *vis-a-vis* the "reasonable juror" test. *U.S.* v. *Winter*, 663 F. 2d 1120 (1st Cir. 1981); *U.S.* v. *Ciampaglia*, 628 F. 2d 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980); *McInerney* v. *Berman*, 621 F. 2d 20 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980); *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979).

A presumption which shifts the burden of proof to the defendant can be recognized by language which instructs the jury that proof of the predicate implies proof of the presumed fact unless disproved by the defendant himself

by a preponderance of the evidence. *McInerney* v. *Berman*, 621 F. 2d at 23. Additionally, a reasonable juror can be expected to listen to all s/he is told by the judge, and will be presumed not to have isolated a particular portion of the charge and ascribed to it more importance than the rest, especially where the jury has been instructed repeatedly that the prosecution must prove its case by proving every element of the offense beyond a reasonable doubt, and would have properly understood the instructions on presumption to mean that they could use common sense inferences from the facts surrounding the crime in deciding whether the prosecution had proved its case. *Id.* at 24.

Moreover, even in cases where the alleged *Sandstrom* error occurs at a crucial point in the instruction, the First Circuit has refrained from finding reversible error. *U.S.* v. *Ariza-Ibarra*, 605 F. 2d 1216, 1228 (1st Cir. 1979), *cert. denied*, —— U.S. ——, 102 S.Ct. 392 (1981). In that case, a charge essentially identical to the one in the case at bar was the *last* thing the judge said to the jury, thereby giving it even greater impact. Yet the court still declined to reverse on that basis.*

Finally, the First Circuit has also found a *Sandstrom* error to be harmless beyond a reasonable doubt where it did not contribute to a defendant's conviction. *U.S.* v. *Winter*, 663 F. 2d at 1144.

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* *Cf. Arroyo* v. *Jones*, No. 82-2072, slip op. at 4100 (2nd Cir., July 23, 1982) (petition for certiorari filed *sub. nom. Jones* v. *Arroyo*) (affirming district court's granting of writ due to *Sandstrom* error in supplemental charge, which was "the last sentence [the jury] heard before returning for their final minutes of deliberation").

B. Second Circuit Analysis

In cases involving claimed *Sandstrom* violations, the Second Circuit concentrates its inquiry on whether the jury charge contained language which was ameliorative of the impermissible phrase, and, following this Court's directions in *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973), requires habeas corpus petitioners to show that a challenged instruction "by itself so infected the entire trial that the resulting conviction violates due process." *See Nelson* v. *Scully*, 672 F. 2d 266 (2d Cir. 1982); *Mancuso* v. *Harris*, 667 F. 2d 206, 211 (2d Cir. 1982); *Washington* v. *Harris*, 650 F. 2d 447 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1455 (1982); *Callahan* v. *Lefevre*, 609 F. 2d 70 (2d Cir. 1979). Moreover, in most of these cases, the Second Circuit reiterates the principles that one erroneous instruction will not necessarily result in a deprivation of a defendant's constitutional rights, and that the challenged instruction must be viewed in the context of the overall charge and with reference to whether the jury would understand the correct rule from the charge as a whole. Indeed, the circuit has explicitly cautioned against any "overly broad reading" of *Sandstrom*, *Washington* v. *Harris*, 650 F. 2d at 452, and has recently found a *Sandstrom* error contained within a charge virtually identical to that in the case at bar to have been ameliorated merely by the phrase "unless such acts were done under circumstances which would preclude the existence of such intent." *Rivera* v. *Coombe*, No. 82-2086 (2d Cir., June 29, 1982).

C. Third Circuit Analysis

The Third Circuit conducts its review of alleged *Sandstrom* violations by determining the "infectious" nature of the instruction, the reliance by the jury upon that in-

struction, and the effect of the charge as a whole. *Martin* v. *Warden, Huntington State Correctional Institution,* 653 F. 2d 799 (3rd Cir. 1981), *cert. denied,* —— U.S. ——, 102 S.Ct. 1019 (1982); *U.S. ex rel. Goddard* v. *Vaughn,* 614 F. 2d 929 (3rd Cir.), *cert. denied,* 449 U.S. 844 (1980). In ascertaining whether the jury was influenced by the erroneous instruction, this circuit examines the way in which a juror could have reasonably interpreted the instruction and whether it can be said with some degree of certainty that the jury did not rely on an erroneous charge. *Martin* v. *Warden,* 653 F. 2d at 802.

D. Fourth Circuit Analysis

In the Fourth Circuit, analysis of a *Sandstrom* problem "necessarily begins with inquiry into the nature of the presumption created by [the instruction]," *Baker* v. *Muncy,* 619 F. 2d 327, 330 (4th Cir. 1980), with the court looking at the actual language of the instructions to determine whether "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Id.*

The fatal language in *Baker* was explicit in shifting the burden to the defendant:

> . . . delivery of a mortal wound with a deadly weapon and without sufficient provocation '*throws upon the slayer the necessity of showing extenuating circumstances.*' (emphasis added) 619 F. 2d at 33.

This instruction, taken with a further instruction that the presumption thus created may be overcome by "proof of extenuating circumstances sufficient to create a reasonable doubt," would cause a reasonable juror to view this burden of creating reasonable doubt as one of persuasion to be borne by the defendant. 619 F. 2d at 330.

E. Fifth Circuit Analysis

The Fifth Circuit concentrates its analysis on the final outcome of a case involving alleged *Sandstrom* violations, *Tennon* v. *Ricketts*, 642 F. 2d 161 (5th Cir. 1981); *Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981), and includes consideration of the language used, the nature of the presumption created, the charge as a whole, and the reasonable interpretation of the charge by the jurors. *Washington* v. *Watkins*, 655 F. 2d 1346 (5th Cir. 1981); *Tyler* v. *Phelps*, 643 F. 2d 1095 (5th Cir. 1981); *U.S.* v. *Caucci*, 635 F. 2d 441 (5th Cir. 1981); *U.S.* v. *Freeman*, 619 F. 2d 1112 (5th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981); *Mays* v. *Balkcom*, 631 F. 2d 48 (5th Cir. 1980).

In *Holloway* v. *McElroy*, *supra*, petitioner argued that the trial court's instruction as to the presumption of malice had relieved the prosecution of its obligation to prove beyond a reasonable doubt every essential element of the crime of murder. Noting that "[h]ad the jury found Holloway guilty of malice murder, the trial court's instructions on malice would certainly have been relevant," the Fifth Circuit nevertheless found that, by pleading self-defense, petitioner had voluntarily focused the entire determination of his criminal culpability on the single question of whether the homicide was justified. Accordingly, when the jury found him guilty only of voluntary manslaughter, petitioner was "in no position to complain" about the *Sandstrom* error, "since it did not ultimately work to his detriment" and was harmless beyond a reasonable doubt.* 632 F. 2d at 617-18.

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* Similarly, in the case at bar, respondent's assertion of self-defense rendered the *Sandstrom* error harmless, for the presumption affected neither the defense of justification nor the State's obligation

(footnote continued on next page)

Finally, the Fifth Circuit has also held that a burden-shifting instructions stating a presumption rather than an inference of intent violate due process and *Sandstrom*, but do not automatically require reversal where there is evidence before the jury of objective conduct demonstrating criminal intent.* *U.S.* v. *Caucci*, 635 F. 2d at 447. *See also U.S.* v. *Meadows*, 598 F. 2d 984 (5th Cir. 1979).

F. Sixth Circuit Analysis

The Sixth Circuit places emphasis on the language actually used in the charge, and whether there is sufficient qualifying or curative language which would enable a reasonable juror to interpret the charge as not shifting any burden to the defendant.** *Harless* v. *Anderson*, 664 F. 2d

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to prove beyond a reasonable doubt each element of the crime. Indeed, since the instruction concerning self-defense was utterly correct, was given in the midst of a charge which emphasized the prosecution's burden of proof no less than forty times, and contained no intimation that respondent must substantiate his claim of self-defense, it is inconceivable that respondent was harmed by two presumptive sentences within the charge, especially since, like petitioner Holloway, he was found guilty of the lesser included offense of manslaughter in the first degree.

* In the instant case, respondent's admission to a detective that he had intended to kill Smokey, his admission to an assistant district attorney that he had threatened to "get even" with his victim, and the fact that respondent caused Smokey's death by a single, well-placed stab wound to the heart are demonstrably objective evidence that respondent intended, at a minimum, to cause serious physical injury, and that habeas corpus relief from a first degree manslaughter conviction was not warranted.

** The charge in the case at bar contained the instruction, "A criminal intent *may* be inferred from all the circumstances of the case." (emphasis added). One day earlier than the Second Circuit's decision in this case, a different panel of the circuit found this same phrase to have ameliorated the burden-shifting effect of the *Sandstrom* error. *Rivera* v. *Coombe*, No. 82-2086 (2d Cir., June 29, 1982).

610 (6th Cir. 1981) (*as amended*, March 8, 1982); *Burton* v. *Bergman*, 649 F. 2d 428 (6th Cir. 1981), *cert. granted and vacated* (on other grounds), —— U.S. ——, 102 S.Ct. 2026 (1982); *U.S.* v. *Williams*, 665 F. 2d 107 (6th Cir. 1981); *Krzeminski* v. *Perini*, 614 F. 2d 121 (6th Cir.), *cert. denied*, 449 U.S. 866 (1980). Moreover, this circuit is guided by the principle that when the evidence of guilt properly admitted at trial is overwhelming, an error of constitutional dimension may be harmless. *Mitchell* v. *Engle*, 634 F. 2d 353 (6th Cir. 1980).

Although there are within the Sixth Circuit a few cases which do not go beyond finding plain error under *Sandstrom* where an instruction is subject to an interpretation by a jury that an irrebuttable presumption is created, *see, e.g., U.S.* v. *Williams*, 665 F. 2d at 710, the circuit generally examines a charge as a whole to determine if sufficient safeguards are attached to prevent the shifting of burdens to the defendant, and (like the Second Circuit) is reluctant to provide an overbroad interpretation of *Sandstrom*. *See Harless* v. *Anderson*, 664 F. 2d at 615.

G. Seventh Circuit Analysis

The Seventh Circuit is satisfied that no *Sandstrom* violation occurs, and, hence, no denial of due process ensues, when a charge contains no mandatory injunction to presume intent and tells the jury that any presumption of "a criminal intent from an unlawful act knowingly done" is rebuttable by "justifying or excusing facts." *Jacks* v. *Duckworth*, 651 F. 2d 480, 486 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1010 (1982). The jury in *Jacks* was also told that they could "look to all the surrounding circumstances, including what was said and done in rela-

tion thereto" to determine intent, 651 F. 2d at 486—a phrase which was found to have offset the questionable instruction, "Everyone intends the natural and probable consequences of his voluntary acts." 651 F. 2d at 486.*

H. Eighth Circuit Analysis

Emphasis on the jury's role as factfinder, as well as on the language used and the weight of the evidence against a defendant, characterize the Eighth Circuit's approach to a *Sandstrom* problem. *U.S.* v. *Ming Sen Shiue*, 650 F. 2d 919 (9th Cir. 1981); *Nelson* v. *Solem*, 640 F. 2d 125 (8th Cir. 1981); *Dietz* v. *Solem*, 640 F. 2d 126 (8th Cir. 1981); *Bonnett* v. *Solem*, 640 F. 2d 125 (8th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 2329 (1981).

A charge to the jury which allows jurors to decide what facts to find from the evidence and permits them to make their own determination, only allows the jury to *consider* that a "person intends the natural and probable consequences of acts knowingly done," *U.S.* v. *Ming Sen Shiue*, 650 F. 2d at 924, and is therefore effectively permissive rather than mandatory.

In contrast to the Second and Seventh Circuits, however, the Eighth Circuit will not uphold instructions which include a phrase to the effect that the presumption that one intends the natural and probable consequences of his acts may be offset by "extenuating circumstances" or "unless it appears from the evidence that some other purpose or unexpected consequence was in the mind of the actor at the time." *Dietz* v. *Solem*, 640 F. 2d at 131.

* Since the instructions in the case at bar contained virtually the same offsetting phrase, the charge would surely have withstood scrutiny within the Seventh Circuit.

I. Ninth Circuit Analysis

The crux of the Ninth Circuit's review of alleged *Sandstrom* violations is a determination of whether the jury would have reached the same conclusion even absent the disapproved jury instruction, thereby making the error complained of harmless. *McGuinn* v. *Crist*, 657 F. 2d 1107 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1614 (1982). In that case, an erroneous instruction regarding presumption of intent from the ordinary consequences of voluntary acts was found to be harmless in light of evidence of deliberate homicide (four shots to the head at close range) and proper instructions with respect to the only disputed issues in the case. 657 F. 2d at 1109.

Additionally, the Ninth Circuit also holds that instructions regarding intent inferable from surrounding circumstances are proper and in keeping with principles of due process.* *See U.S.* v. *Mayo*, 646 F. 2d 369, 375 (9th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 979 (1981); *U.S.* v. *Ross*, 626 F. 2d 77, 79-80 (9th Cir. 1980).

J. Tenth Circuit Analysis

The Tenth Circuit focuses on the language used in the charge to the jury and the nature of the presumption created, and will allow inferences regarding intent where proper emphasis is placed on the burden to be borne by the government. *U.S.* v. *White*, 649 F. 2d 779 (10th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 357 (1981); *U.S.* v.

* Since the charge concerning self-defense in the case at bar was entirely correct and unobjected to, and since the instructions regarding the intent inferable from surrounding circumstances are not violative of due process, respondent's conviction would have been upheld in the Ninth Circuit.

Tecumseh, 630 F. 2d 749 (10th Cir.), *cert. denied*, 449 U.S. 961 (1980); *U.S.* v. *Ogle*, 613 F. 2d 233 (10th Cir. 1979), *cert. denied*, 449 U.S. 825 (1980). These cases did not involve use of *Sandstrom* language *per se*, but rather permissive instructions regarding inferring intent from the surrounding circumstances of the case.

It is quite apparent that this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) has generated widely disparate analyses of the effect of burden-shifting language, and it is equally evident that the jury charge preceding respondent's conviction for manslaughter in the first degree would have withstood scrutiny in many Courts of Appeals.

To be sure, two sentences out of the court's 31-page charge in the instant case bore a superficial similarity to the burden-shifting language condemned in *Sandstrom*, but these errors were more than offset and cured by the court's repeated emphasis on the fact-finding function of the jury and the burden of proof to be borne throughout by the prosecution. In *Sandstrom*, the trial court's charge concerning intent consisted of the single unqualified sentence, "The law presumes that a person intends the ordinary consequences of his voluntary acts," and defendant therein vigorously objected to the inclusion of this language in the instruction. In contrast, the trial court in the case at bar went to great lengths to explain that the issue of respondent's intent was a factual one which only the jury could determine, and to qualify almost every page of its instructions with continual reminders that the burden of proof with regard to everything at issue (including but

not limited to disproving respondent's defense of justification) rested squarely, unambiguously, and unequivocally upon the People. Moreover, respondent made no objection to the error now complained of, nor to the instruction regarding self-defense, and in view of this Court's prior holding that an unobjected-to instruction will rarely constitute a denial of due process warranting federal habeas corpus relief, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), the instant case presents an unusually timely opportunity for clarification of the import of a *Sandstrom* error which was not the target of a contemporaneous objection and which has become susceptible of many modes of analyses by the Courts of Appeals. *See Jones* v. *Arroyo*, No. 82-2072 (2d Cir., July 23, 1982) (petition for certiorari filed).

In sum, then, although the court's charge contained two objectionable sentences, the remainder of the charge ameliorated rather than exacerbated this error. Plainly, respondent profited from the court's instruction, for after having told both a detective and an assistant district attorney that he intended to kill or get even with Smokey, he nevertheless convinced the jury that he possessed no such intent—a feat he could not have accomplished had the jury improperly employed the presumption inviting them to equate the consequence (death) with the intent. *See United States* v. *Winter*, 663 F. 2d 1120, 1144 (1st Cir. 1981) (error in jury instruction harmless beyond a reasonable doubt because it did not contribute to defendant's conviction). *See especially Holloway* v. *McElroy*, 632 F. 2d 605, 617-618 (5th Cir. 1980) (erroneous instruction as to presumption of malice held harmless beyond a reasonable doubt where jury ultimately convicted defendant of voluntary man-

slaughter). Since the guidance given the jury was more than adequate to enable it to fulfill its function properly, and since the jury obviously functioned in respondent's favor by acquitting him of murder in the second degree, any error in the court's instructions must be viewed as harmless. *Chapman* v. *California,* 386 U.S. 18 (1967).

Accordingly, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the petition for a writ of habeas corpus denied.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 1, 1982

Respectfully submitted,

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State of New York
Attorney for Petitioner

PETER H. SCHIFF
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APPENDIX A

Decision of the Court of Appeals for the Second Circuit

Felix Ramirez,

Petitioner-Appellee,

v.

E. W. Jones, Superintendent,

Respondent-Appellant.

No. 966, Docket 81-2431.

United States Court of Appeals,
Second Circuit.

Argued April 6, 1982.

Decided June 30, 1982.

Before Kearse and Pierce, Circuit Judges, and Leval, District Judge.*

Pierce, Circuit Judge:

On November 11, 1976, appellee Ramirez was involved in an altercation with one Estaban ("Smokey") Casilla during which appellee stabbed Casilla, who later died from the wound. Appellee was indicted for murder in the second degree and tried before Justice Ivan Warner and a jury in New York State Supreme Court, Bronx County. At trial appellee admitted stabbing Casilla, but contended that

* Hon. Pierre N. Leval, United States District Judge for the Southern District of New York, sitting by designation.

he had acted in self-defense. On May 4, 1978, appellee was convicted of manslaughter in the first degree. He was subsequently sentenced to imprisonment for an indeterminate term of five to fifteen years.

On July 17, 1980, appellee's conviction was affirmed by the Appellate Division, First Department, in a lengthy opinion from which two justices dissented. *People v. Ramirez*, 76 A.D.2d 115, 430 N.Y.S.2d 83 (1st Dep't 1980). Appellee's application for leave to appeal to the New York Court of Appeals was denied on August 21, 1980. Appellee then filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Southern District of New York, 530 F.Supp. 345. Appellee contended therein that by charging the jury, *inter alia*, that "[a] person is presumed to intend the natural and probable consequences of his acts," the state court improperly shifted the burden of proof on the issue of intent to the defendant in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). On November 16, 1981, the district judge granted appellee's petition and ordered that he be released unless retried within sixty days. The State appealed, and on December 22, 1981, Judge Motley granted a stay of her order pending this Court's decision of the appeal. We now affirm.

The circumstances under which Casilla was stabbed on November 11, 1976, were hotly contested at appellee's trial. According to the People's evidence, the incident which resulted in Casilla's death began outside a social club when he and appellee became embroiled in a heated argument over a woman. Casilla then suggested to appellee that the two of them should "fight like a man, one on one."

Appendix A

(Tr. 112). Prosecution witnesses testified that, in preparation for the fight, Casilla took off his jacket and turned to give it to one of his friends to hold. They stated that while Casilla was thus turned away, appellee pulled out a knife and stabbed Casilla in the chest. A melee ensued during which appellee was hit on the shoulder with a cane and/or a crowbar or police lock bar, and appellee moved toward Casilla's associates, who remained nearby, brandishing his knife. Finally, two police officers arrived at the scene and arrested appellee.

Appellee testified in his own defense and presented a different view of the events which occurred before and after the stabbing of Casilla. He testified that approximately two weeks prior to the incident on November 11, 1976, Casilla and two other men accosted appellee on the street, beat him, and robbed him of his money, wristwatch, a medal and a ring which he wore on a chain around his neck.[1] He testified further that on November 11, 1976, while walking outside the social club, he was surrounded by five men. Casilla was carrying a police lock bar; the others had sticks and canes.[2] When the men had surrounded him, Casilla stated that they were going to "do to me the same thing they had done the first time." (Tr. 302). According to appellee, Casilla then swung at him with the police lock bar. Appellee ducked and then pulled out a knife and

1. Appellee testified that at the time of this robbery (October 30, 1976), he did not know any of the three men who attacked him. However, when he saw Casilla on November 11, he recognized him as one of the three men.

2. Both of Casilla's associates who testified at appellee's trial admitted that they, Casilla, and the others present when Casilla was stabbed, were members of a gang called the Savage Nomads.

stabbed Casilla.[3] Appellee testified that his intent at that time was to defend himself. He testfiied, "I got scared. I got nervous because they all surrounded me and that's when—I squeezed the knife that I had but not with the intention of killing him but of defending myself." (Tr. 322). After the stabbing, appellee brandished the knife at the four men who still surrounded him and who he thought were going to jump him and beat him with their sticks. The police then arrived and arrested appellee.

In addition to the above, Assistant District Attorney Knauer, who interviewed the appellee at the police station after his arrest, and testified for the prosecution at the trial, stated that appellee admitted to him, at the station house, that after the hold-up on October 23, he (Ramirez) told Casilla that he would "get even" with him. In his summation to the jury, appellee's counsel argued, in light of Assistant District Attorney Knauer's testimony, that, even if, on October 30, when Casilla allegedly beat and robbed appellee, appellee did in fact threaten to "get even" with Casilla, "all that meant was he would do the same thing that happened to him, that was done to him by Smokey and the two other men. What was that [?] [B]eing robbed and being assaulted. Certainly there is nothing there to indicate any intent to kill . . . ." (Tr. 471). It is clear, therefore, that appellee sought to convince the jury that when he stabbed Casilla he lacked any intent to kill him.[4]

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3. Appellee testified that he had a kitchen knife with him because he had just finished using it to clean the battery in this brother's car.

4. Appellee's trial counsel did request that the court charge manslaughter in the second degree and assault as lesser included offenses. The court declined to do so.

Appendix A

The Sandstrom Violations

The trial judge charged the jury extensively with reference to the question of intent. He stated as follows:

"Let me now define this word intent for you.

A person is presumed to intend the natural and probable consequences of his acts. Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof to constitute the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed, rests upon the Prosecution to establish by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof to an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only

determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, you then are to determine the intention of the perpetrator at the time.

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts. The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind, and it's [sic] physical manifestation[,] [*t*]*he accomplishment of the thing determined upon*[.] [*O*]*ne's mind is compelled from necessity to refer to the acts and physical manifestations of the intent exhibited by the results produced is the safest, if not the only* [,] *proof of the fact to be ascertained.* A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." (emphasis added).

It is clear to this Court, as the district judge found, that the italicized portions of this charge shifted the burden of proof as to the intent issue to the appellee.[5] In *Sandstrom*

5. Appellee's trial counsel did not object to the trial court's charge on the issue of intent. Nevertheless, the Appellate Division did reach the merits of appellee's claim. Since the Appellate Division thus chose to ignore the New York State contemporaneous objection rule, "we see no warrant . . . for guarding state procedural rules more vigilantly than the State itself does." *Washington v. Harris*, 650 F.2d 447, 452 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1455, 71 L.Ed.2d 666 (1982). *See also Engle v. Isaac*, —— U.S. ——, 102 S.Ct. 1558, 1575 n.44, 71 L.Ed.2d 783 (1982); *Castaneda v. Partida*, 430 U.S. 485 n.4, 97 S.Ct. 1272, 1275 n.4, 51 L.Ed.2d 498 (1977)

v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court held that such a shifting of the burden as to an essential element of the crime charged was unconstitutional in light of its earlier holding in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that a defendant may not be convicted of a crime unless the prosecution meets the burden of proving beyond a reasonable doubt every element of the crime charged.

On appeal the State argues that the challenged portions of the charge given by the state court judge herein must be reviewed in the context of the entire charge, and that when viewed in that light any error was harmless. While the State's premise is correct, *see Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Nelson v. Scully*, 672 F.2d 266 (2d Cir. 1982); *Mancuso v. Harris*, 677 F.2d 206 (2d Cir. 1982), we do not agree with its conclusion.

As stated in *Cupp, supra*, "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* 414 U.S. at 147, 94 S.Ct. at 400. In *Nelson, supra*, this Court took heed of this warning and carefully analyzed the *Sandstrom*-type language in the context of the entire charge given. After making this examination, we concluded that "taking the entire charge into consideration, there was [no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272.

Appendix A

In *Mancuso, supra,* at 210, this Court undertook a similar analysis of the language said to be violative of *Sandstrom,* and, after reviewing it in the context of the entire charge given by the state trial judge, rejected the contention that the inclusion of that language had violated the petitioner's constitutional rights. In addition, the Court found it significant that, in that case, the defendant had not specifically placed the question of his intent in issue, but had attempted instead to disassociate himself entirely from any involvement in the crime charged. *Id.,* at 211. *See also United States v. Reeves,* 594 F.2d 536, 541 (6th Cir.), *cert. denied,* 442 U.S. 946, 99 S.Ct. 2893, 61 L.Ed.2d 317 (1979).

In this case, however, appellee admitted that he stabbed Casilla. Thus the essential issue to be decided by the jury was whether appellee possessed the intent necessary to support a conviction for either murder in the second degree or manslaughter in the first degree.[6]

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6. New York Penal Law § 125.25 defines murder in the second degree, in pertinent part, as follows:

> "A person is guilty of murder in the second degree when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

New York Penal Law § 125.20 defines manslaughter in the first degree, in pertinent part, as follows:

> "A person is guilty of manslaughter in the first degree when:
>
> 1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
>
> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . ."

In this regard we do not agree with the argument that by asserting the defense of self-defense the appellee conceded his intent kill Casilla. At trial appellee stated that he had acted in self-defense, that he was afraid for his life, and that he had no intent to kill. In this context, appellee's intent to defend himself is consistent with either (a) an intent to kill, (b) an intent to injure seriously, or (c) an intent to injure slightly. *See Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982). Thus, it cannot be said that the theory of defense in this case contributes to a finding that the offending portions of the charge to the jury created "[no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272, *Mancuso, supra*, at 211.

An analysis of the charge given in the state court leads us to the same conclusion. The trial judge twice charged the mandatory presumption that "a person is presumed to intend the natural and probable consequences of his acts," which was found to be constitutionally defective on the facts in *Sandstrom, supra*. In addition, toward the end of the charge as to intent, the judge greatly exacerbated its problematic character by stating that "the acts and physical manifestations of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained." Although the charge did also contain some instructive language which may have tended to be curative, we cannot say that, reading the charge as a whole, "there was [no] significant possibility that harm was done." *Nelson, supra*, 672 F.2d at 272. The fact that the court gave instructions as to the requirement that the prosecution must carry the burden of proof and as to the

reasonable doubt standard of proof does not cure the *Sandstrom* error present here since a reasonable juror could well have concluded that the presumption as to intent constituted a method of satisfying the prosecutor's burden. *Sandstrom, supra,* 442 U.S. at 519 n.7, 99 S.Ct. at 2456 n.7.

To refuse to grant the petition for a writ of habeas corpus in this case, where the violation was significant, and where intent was *the* crucial issue to be decided by the jury, would be wholly unwarranted in light of the holding of *Sandstrom.*

Retroactivity

Appellee was convicted in the state court on May 4, 1978. The Supreme Court rendered its decision in *Sandstrom, supra,* on June 18, 1979. On this appeal the State argues that *Sandstrom* should not be "retroactively" applied to invalidate convictions entered before the Supreme Court announced its decision in that case. However, even prior to the Supreme Court's decision in *Sandstrom, supra,* use of the language proscribed therein by a New York court was unwarranted in light of the law of both the State of New York and of this Circuit. In *People v. Thomas,* 50 N.Y.2d 467, 429 N.Y.S.2d 584, 407 N.E.2d 430 (1980), the New York Court of Appeals stated that "*Sandstrom* did not alter the law of this State. For more than a century, the charge condemned in *Sandstrom* has been held by this court, to be erroneous as a matter of State law (*Stokes v. People,* 53 N.Y. 164, 179 [(1873)]; *People v. Baker,* 96 N.Y. 340, 350 [(1884)]; *People v. Downs,* 123 N.Y. 558, 564-568, 25 N.E. 988 [(1890)]; *People v. Flack,* 125 N.Y.

324, 335, 26 N.E. 267 [(1891)]; *People v. Weiss*, 290 N.Y. 160, 171, 48 N.E.2d 306 [(1943)].)" 50 N.Y.2d at 472-73, 429 N.Y.S.2d at 587, 407 N.E.2d at 433. *See also United States v. Robinson*, 545 F.2d 301, 305-06 (2d Cir. 1976) ("the 'natural and probable consequences' charge . . . is a burden-shifting charge which has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt." 545 F.2d at 306); *United States v. Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975); *People v. Getch*, 50 N.Y.2d 456, 464 n.2, 429 N.Y.S.2d 579, 583 n.2, 407 N.E.2d 425, 429 n.2 (1980).[7]

We find, therefore, given the full context of this case, that the state judge's charge to the jury violated the constitutional rights of the appellee. Consequently, the decision of the court below granting the writ is affirmed. The mandate shall issue forthwith, and appellee must be released by the State unless he is retried within ninety days from the date the mandate issues herein.

LEVAL, District Judge, Sitting by Designation, concurring:

I concur, but add a few words on the significance of petitioner's failure to object at trial. As Judge Pierce notes, *see supra* note 5, the failure to object at trial should not be

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7. In *People v. Getch*, *supra*, 50 N.Y.2d at 464, 429 N.Y.2d at 583, 407 N.E.2d at 429, the New York Court of Appeals held, on federal constitutional grounds, that the Supreme Court's holding in *Sandstrom* was applicable to all cases still in the New York appellate process as of the date of that decision (June 5, 1980). As noted previously, appellee Ramirez's conviction was not affirmed by the Appellate Division until July 17, 1980. In reaching its decision the Appellate Division addressed appellee's *Sandstrom* claim, and rejected it, on the merits. 76 A.D.2d 115, 430 N.Y.S.2d 83 (1st Dep't 1980).

treated as a procedural bar to our consideration of the merits if it was not so treated by State appellate court. We should indeed not guard a state procedural rule more vigilantly than the state does. *See Washington v. Harris,* 650 F.2d 447, 452 (2d Cir. 1981).

This proposition means only that the door to the federal court will not be closed. It does not mean that the failure to object disappears from consideration. Upon the federal court's examination of the question whether the state conviction violated petitioner's constitutional rights, the failure to object remains a factor to be accorded whatever significance and weight it deserves.

A failure to object contemporaneously can be significant in a number of ways, apart from triggering a state law procedural bar. It is a part of the context of the alleged error. It can serve as a practical indication of the small importance of the incident, as appraised by trial counsel. It may result from a conscious choice by counsel to preserve the benefit of the error for appeal or collateral attack, rather than have it cured by bringing it to the trial judge's attention. It can raise questions of fairness to the People. In the practical context of a trial, furthermore, it can even occur through a prior understanding between counsel and the trial judge that is not reflected on the record. (For example, counsel for defendants who do not testify often ask the trial judge to omit the standard draw-no-inference charge.)

A state appellate court's consideration of the merits does not necessarily imply a finding that the failure to object should carry no adverse consequence for the defend-

ant. By hypothesis, the cases we consider on *habeas* are those in which the state appellate court has ruled against the defendant. In this case, it can be confidently inferred from the opinion of the Appellate Division that its reason for reaching the merits was the importance of giving guidance to the lower courts on a question rendered controversial by the Supreme Court's recent decision in *Sandstrom*. There was no appraisal nor even mention in the majority opinion of the failure to object. Since the court ruled against petitioner on the merits, reference to his failure to object was unnecessary. The fact that the ruling was made on the merits carries no logical inference that the court rejected procedural considerations or found them to be without significance.

When the federal court considers the issue on *habeas* and rejects the state court's analysis of the constitutional issue, it must then give whatever consideration is appropriate to the procedural context in determining whether the error committed calls for granting the writ and vacating the conviction. It would be anomalous if a federal appeals court considering functionally identical trial records, one on appeal from the district court and one on *habeas* from the state court, would affirm the federal conviction on a harmless finding, but vacate the state conviction over which federal review power is far more limited.

Because the charge in this case contained errors far more potent than the erroneous, but relatively bland, *Sandstrom* transgression, and because the faulty language bore directly on petitioner's intent—the central issue in the case, petitioner's failure to object does not alter the conclusion that he is entitled to a new trial.

APPENDIX B

Decision of the United States District Court for the Southern District of New York

Felix Ramirez,

Petitioner,

v.

E. W. Jones, Superintendent, Great Meadow Correctional Facility, Comstock, New York,

Respondent.

No. 80 CIV. 0797 (CBM).

United States District Court,
S. D. New York.

Nov. 16, 1981.

OPINION

Motley, District Judge.

Petitioner, Felix Ramirez, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated at the Great Meadow Correctional Facility at Comstock, New York. He was convicted upon

a jury verdict of manslaughter in the first degree in the New York Supreme Court, Bronx County on May 4, 1978. Judge Warner sentenced him to an indeterminate 5-15 year period of imprisonment.

Petitioner appealed his conviction to the Appellate Division arguing, *inter alia*, that the court's charge to the jury on intent eliminated the People's duty to prove intent, or shifted the burden of proof on that element, thereby denying him due process of law and a fair trial. On July 17, 1980, the New York Appellate Division, First Department, affirmed petitioner's conviction in a 3-2 decision, with majority and dissenting opinions that reached the issue on its merits. *People v. Ramirez*, 76 App.Div.2d 115, 430 N.Y.S.2d 83 (1st Dept. 1980). On August 21, 1980, petitioner's application for leave to appeal to the New York State Court of Appeals was denied.

The State Courts have thus had a "fair opportunity" to consider the alleged constitutional defect and petitioner, consequently, has satisfied the procedural prerequisite for all habeas corpus proceedings. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *United States ex rel. Nelson v. Zelker*, 465 F.2d 1121 (2d Cir.), *cert. denied*, 409 U.S. 1045, 93 S.Ct. 544, 34 L.Ed. 497 (1972). This court will therefore reach the merits of his claim.

Facts

Only a brief recitation of the facts is necessary to highlight the legal question at issue in this case. On November 11, 1976, petitioner and Estaban Casilla ("Smokey") had

an argument over a woman at a social club in the Bronx. The argument became heated and, apparently in preparation for a fight, Smokey removed his jacket and handed it to his friend, Del Valle. When Smokey's back was turned, petitioner pulled out a knife and stabbed Smokey in the chest, mortally wounding him. Del Valle, having turned to put down Smokey's jacket, did not actually see the stabbing, but did see the knife in petitioner's hand upon turning back. (Tr. 128-30).

Petitioner took the stand and testified at trial that at the time of the incident, he had been approached by five youths, including Smokey, who was carrying a police lock bar.[1] Petitioner testified that Smokey swung at him with the police lock bar, petitioner ducked to avoid the blow and, intending only to defend himself, stabbed Smokey. (Tr. 300-08).

The crucial issue before the jury was thus not whether petitioner had stabbed Smokey, which was admitted, but rather what his *intent* was, i.e. to cause death (second degree murder),[2] to cause serious physical injury (first de-

1. A police lock bar is part of a special apartment door lock. It is a cylindrical metal rod, about four feet long, which slips through a hinge on the inside of the door, its other end secured in a hole in the floor. (Tr. p. 171).

2. "A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person . . ."

New York Penal Law § 125.25(1).

gree manslaughter),[3] or to defend himself from attack from Smokey (justification).[4]

The trial court's entire charge on the definition of intent was as follows:[5]

"Let me now define this word intent for you.

A person is presumed to intend the natural and probable consequences of his acts. Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof to constitute

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3. "A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person . . ."

New York Penal Law § 125.20(1).

4. Under New York Penal Law § 35.05, conduct which would otherwise constitute an offense is justifiable and not criminal when:

"2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."

New York Penal Law §§ 35.10(6) and 35.15(2) further provide that a person may be justified in using physical force, even deadly force, under certain circumstances in order to defend himself. Thus, in New York, justification is a complete defense.

5. This definition of intent occurred during the portion of the charge dealing with murder in the second degree, an offense of which petitioner was acquitted. In the charge on manslaughter in the first degree, the offense of which petitioner was convicted, the court did not, however, give any definition of intent, an essential element of that crime. Thus, it can be assumed that the charge on intent was meant to apply to the manslaughter charge as well, and that the jury so understood it.

the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed rests upon the Prosecution to establish by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof of an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, you then are to determine the intention of the perpetrator at the time.

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts.

> The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind and its physical manifestation. *The accomplishment of the thing determined upon one's mind is compelled from necessity to refer to the acts and physical manifestation of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained.* A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

(Tr. 520-523) (emphasis added)

Petitioner now claims, as he did before the State Appellate courts,[6] that this charge to the jury deprived him of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Discussion

Petitioner argues that the trial court's instructions to the jury on the issue of intent violated his right to a fair trial by shifting the burden of proof on this issue to him, or by eliminating the People's duty to prove intent.

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6. Although trial counsel did not except to this instruction at trial, the Appellate Division did not reject the issue because of a failure to meet New York's contemporaneous objection requirement. Instead, the Appellate Division addressed the merits of Petitioner's constitutional claim. It is well established in this Circuit that where the Appellate Division has determined to consider the merits of an issue notwithstanding a defendant's failure to lodge a contemporaneous objection at trial, habeas corpus review is not precluded. *See, e.g., Washington v. Harris*, 650 F.2d 447, 451 (2d Cir. 1981) (there is "no warrant . . . for guarding state procedural rules more vigilantly than the state itself does").

Appendix B

There is no question that the due process clause protects the criminal defendant against conviction except upon proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecution must prove each and every element of a crime beyond a reasonable doubt and may not shift this burden to the defendant. *Id.* at 364, 90 S.Ct. at 1072. Indeed, in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (*Sandstrom*), the Supreme Court held that instructing the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," where the intent of the accused is an ingredient of the crime charged, is violative of the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, as it has the effect of relieving the People from proving the critical element of a defendant's state of mind.

Here, in the charge of the jury on the issue of intent, the trial court began the charge by stating that "[a] person is presumed to intend the natural and probable consequences of his acts" and concluded the charge with the admonition that "[u]nder our law, every person is presumed to intend the natural and inevitable consequences of his own acts." (Tr. 521-22). The state concedes that these two sentences bear a similarity to the language condemned as burden-shifting in *Sandstrom, supra,* but argues that these errors were more than ". . . offset and cured by the court's repeated emphasis on the fact-finding function of the jury and the burden of proof to be borne throughout by the prosecution." (Respondent's Brief, p. 8). The state

additionally relies on the fact that the trial court ". . . alluded to and explained the nature and importance of the reasonable doubt standard—and the role and responsibility of the jury in assessing such doubt—no less than 40 times." *Id.*

It is true that a jury instruction must be viewed in the context of the overall charge. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *Callahan v. LeFevre*, 605 F.2d 70 (2d Cir. 1979). This does not mean, however, that an instruction by itself may never rise to the level of constitutional error. *Cupp v. Naughten, supra*, 414 U.S. at 147, 94 S.Ct. at 400. Instead, what it indicates is that the proper inquiry is whether the remainder of the charge ameliorated or aggravated the impact of the challenged instruction, *Callahan, supra*, 605 F.2d at 74-75, and whether the constitutionally infirm instruction "infected the entire trial." *Cupp v. Naughten, supra*, 414 U.S. at 147, 94 S.Ct. at 400.

The state's argument appears to be that this issue can be resolved by lining up the number of times the jury is instructed correctly against the number of times it is instructed erroneously. There is no support for this argument. It is patently clear that in *Sandstrom* the Court was concerned with the *impact* of the erroneous instruction upon the jury, and whether a reasonable juror could have interpreted the instruction as shifting or eliminating the People's burden of proof. *Id.* 442 U.S. at 514, 99 S.Ct. at 2454. Here, while the unconstitutional portions of the charge were qualified during the charge by reference to the fact-finding function of the jury, the trial court also told the

jury that "the intent exhibited by the results produced is the safest, *if not the only* proof of the fact to be ascertained." (emphasis added). This sentence, together with those identical to the instructions condemned in *Sandstrom*, overbears the qualifying portions and makes it extremely likely that a reasonable juror could have interpreted the instruction on intent, taken as a whole, as a conclusive presumption.

A conclusive (or mandatory) presumption is one where the jury is required to find an ultimate fact to be true upon proof of another fact unless they are persuaded by a preponderance of evidence offered in rebuttal. The conclusive presumption "may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).

A permissive inference allows, but does not require, the jury to infer the ultimate fact from proof of the basic one. The permissive inference

> leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof; it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could have made the connection permitted by the inference.

Id.

The ultimate test of the constitutional validity of both of these devices remains constant: the device must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the State, to find the facts beyond a reasonable doubt. *Id.* at 156, 99 S.Ct. at 2224.

Here, the jury received both a permissive instruction and conclusive presumptions. This court is not persuaded, however, that the additional permissive instruction was sufficient to dissipate the unconstitutional effect of the conclusive presumptions. As stated in *Sandstrom*:

> [E]ven if a jury could have ignored the [conclusive] presumption . . . we cannot be certain this is what they *did* do. As the jury's verdict was a general one . . . we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction. And "it has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." [citations omitted]

Id. 442 U.S. at 526, 99 S.Ct. at 2460. (emphasis in the original).

The *Sandstrom* Court also considered and rejected the argument, raised by the state here, that a proper instruction on the burden of proof and the presumption of innocence could offset the effect of the erroneous burden-shifting presumption.

> It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must

> be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

442 U.S. at 518 n.7, 99 S.Ct. at 2456 n.7.

Both the New York Court of Appeals and The Second Circuit have had occasion to consider the question at issue here. In *People v. Getch*, 50 N.Y.2d 456, 429 N.Y.S.2d 579, 407 N.E.2d 425 (1980), the Court of Appeals upheld the trial court's instruction that "*you may infer* that a person intends that which is the natural and necessary and probable consequences of the act done by him . . . [*Y*]*ou have a right to find* from the results produced an intention to effect it," 429 N.Y.S.2d at 582, 407 N.E.2d at 428, (emphasis added), because the specific burden-shifting instruction condemned in *Sandstrom* was not in the trial court's charge. In *People v. Marr*, a companion case decided on the same day, the challenged instruction, like the one here and in *Sandstrom*, was "*The law says* that a person is presumed to intend that which he actually does" and, later, "A person intends [the] natural and reasonable and probable consequences of his acts." *Id.* at 581, 407 N.E.2d at 427.* Unlike in *Getch*, the Court of Appeals concluded that there should be a reversal because "the court's instructions on intent followed, almost verbatim, the terms of the *Sandstrom* charge." *Id.* at 583, 407 N.E.2d at 429. This result was reached notwithstanding the fact that the trial court had informed the jury that the State had the burden of proving every element, including intent, beyond a reasonable doubt. *Id.*

In *United States v. Robinson*, 545 F.2d 301 (2d Cir. 1976), the district court, after charging the jury that the

* (emphasis added)

government had the burden of proving "intent to defraud," charged:

> In determining the issue of intent in this case a jury may reasonably infer, as I said before, that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

Id. at 305.

The Second Circuit reversed, in spite of the fact that the jury had been correctly instructed on the government's burden of proving intent and guilt beyond a reasonable doubt. "We cannot conclude that the jury ignored the specific, erroneous instruction. On the contrary, the jury probably applied the erroneous instruction and believed the government had satisfied its burden by proving mere negotiation of the checks." *Id.* at 306. *See also Washington v. Harris*, 650 F.2d 447, 453 (2d Cir. 1981) (finding "natural and probable consequences" charge at issue here impermissible, and remanding on other grounds).

What thus becomes clear is that by twice instructing the jurors that a person is presumed to intend the natural and probable consequences of his act, supplemented by directions that "the result[] produced is the safest, if not the only proof" of intent, the trial court ran afoul of the constitutional guarantees specifically enunciated in *Sandstrom*

and later affirmed by the New York Court of Appeals and Second Circuit. The court's charge here precluded the jury's proper consideration of the major trial issue—what petitioner intended—and concomitantly relieved the State from the burden of proving intent beyond a reasonable doubt. Reasonable jurors could have concluded that petitioner was either required to persuade them that he lacked intent, or that they were compelled to find intent because petitioner admitted, in the context of his claim of self-defense, that he stabbed Smokey. Consequently, petitioner was deprived of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Accordingly, the instant petition for writ of habeas corpus is granted and it is ordered that petitioner be released unless retried within sixty (60) days of the date of this court's order.

FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

No. 82-584

E.W. JONES, Superintendent,
Green Haven Correctional Facility,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that respondent's Fourteenth Amendment right to due process was violated by the trial court's instruction, in a case where respondent's intent was "the crucial issue," that a person is "presumed to intend the natural and inevitable consequences of his own acts" and that "the acts" and "the results produced is the safest, if not the only proof" of intent.

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STATEMENT OF THE CASE

Respondent adopts the statement of the facts as found by the court of appeals. Appendix A, pp. 1a-6a.

To the facts presented by the State in its petition, respondent adds the following:

Both Reynaldo Del Valle (known as "Cano" because he generally carried a cane) and Leonardo Lopez ("Nandy") were members of the gang, the Savage Nomads, of which Smokey was the acknowledged leader. Both testified that the incident occurred while respondent was backed against the wall outside the club, with the five Savage Nomads surrounding him. Although both said at trial that Smokey was unarmed, Smokey's brother Moses ("Tito"), who did not testify, told Detective Danaher on the night of the incident that Smokey indeed had a police lock bar which he passed to Tito when the argument heated up.

At trial, respondent testified through a Spanish interpreter and described the incident as follows:

> I saw the police bar fall to the ground. They tried, they tried to get on top of me and I kept the knife and I tried moving around all around with the knife so that they wouldn't hit me with the stick (R. 306).

All he ever thought of was defending himself:

> I got scared. I got nervous because they all surrounded me and that's when --I squeezed the knife that I had but not with the intentions of killing him but of defending myself (R. 322).

Respondent's contemporaneous version of the incident squared substantially with this trial testimony. The only inconsistency arose from Detective Danaher's testimony that when

respondent was told during the interview that Smokey had died, he said in English "words to the effect, good, that's what I meant to do." However, Detective Danaher testified that his interview with respondent was otherwise conducted totally through a Spanish-speaking police officer, and respondent's interview with Assistant District Attorney Edwin Knauer was also conducted through a Spanish interpreter. Moreover, no witness other than Danaher suggested that respondent spoke any English at all, and respondent denied making the English statement to Danaher.

Finally, totally absent from the petition is any acknowledgment that the State's rebuttal witness, respondent's sister, Maria Ramirez, after first testifying for the prosecution (Pet., pp. 7-8), subsequently testified for the defense that Smokey's wife and the gang had coerced her previous testimony. In fact, she had not seen her brother talk to Smokey's wife that night.

Opinions Below

The court of appeals and the district court both based their findings of a due process violation on the clear Sandstrom error and the aggravating language following that instruction: that the "act" and "the result...produced is the safest, if not the only proof" of intent, (which is quoted, but not italicized, at page 9 of the Petition). The two dissenting justices in the New York State Appellate Division would have reversed the conviction for the same reason.

REASONS FOR DENYING THE WRIT

Applying constitutional principles enunciated by this Court, the court of appeals correctly found that Mr. Ramirez's Fourteenth Amendment right to due process was violated by the trial court's mandatory instructions, first at the beginning of its intent charge, that "[a] person is presumed to intend the natural and probable consequences of his acts," and then later that "[u]nder our law, every person is presumed to intend the natural and inevitable consequences of his own acts." This second statement was followed with the direction that "the mind is compelled from necessity to refer to the acts" and "the results produced" as "the safest if not the only proof" of intent.

The State has not argued in this Court or in the courts below that these instructions were not error under Sandstrom v. Montana, 442 U.S. 510 (1979). Rather, by simply ignoring the direction about the "safest" and "only" proof of intent, the State argues that the balance of the charge cured the error or that the error was harmless. Alternatively, the State urges this Court to review respondent's case because of alleged confusion among the circuits in applying Sandstrom. These arguments should be rejected. Nothing in the balance of the charge here blunted the impact of the mandatory language, and no view of harmless error can excuse the unconstitutional charge in this case. Moreover, Sandstrom's progeny in the circuit courts of appeal show substantial harmony.

A.

The court below reached the decision in this case on the basis of this Court's mandate in Cupp v. Naughten, 414 U.S. 141, 147 (1973) that it determine "whether the ailing instruction by itself so infected the entire trial." Thus, once having found the challenged language constitutional error, the court searched the balance of the charge to determine its overall impact. Focusing on the trial judge's subsequent direction that "the act" and "the results produced" are the "safest" or even the "only" reliable evidence of intent, the court found the charge as a whole "greatly exacerbated" the error. The court rejected the argument that the presence of "some instructive language which may have tended to be curative" ameliorated the harm, stating "we cannot say that, reading the charge as a whole, 'there was [no] significant possibility that harm was done.'" Appendix A, p. 9a. The court thus distinguished Nelson v. Scully, 672 F.2d 266, 272 (2d Cir. 1982), where similar mandatory language was cured by "pointed, emphatic, repeated and detailed" instructions on the State's burden of proof beyond a reasonable doubt, a listing of facts the jury "might 'inferentially' consider," and "hammering" away at permissive language. See also, Rivera v. Coombe, 683 F.2d 697, 700-1 (2d Cir. 1982)(error cured since charge as a whole emphasized permissive language and analysis of the surrounding circumstances).

When the court analyzed the charge in "the full context of th[e] case," its conclusion did not change.[1] Because respondent's justification defense removed from dispute whether or not he had performed the act, i.e., wielded the knife, his intent was "the essential issue to be decided by the jury." Appendix A, p. 10a. The justification defense does not include an admission of intent to cause serious physical injury. It merely asserts that the stabbing -- whether it was the result of conduct that was intentional, reckless, negligent or something else -- was justified as a response to the display of deadly physical force by Smokey and the other Savage Nomads. See N.Y. Penal Law §35.15(2). Accord, Mason v. Balkcom, 669 F.2d 222, 227 (5th Cir. 1982); see also Burton v. Bergman, 649 F.2d 428, 432, vacated on other grounds, ____ U.S. ____, 102 S.Ct. 2026 (1982).

Moreover, the evidence in this case is clearly consistent with a determination that Mr. Ramirez did not have the requisite intent to injure Smokey seriously. Finding himself surrounded by armed members of a street gang, Mr. Ramirez lashed out with a kitchen knife that he was carrying only by chance. His response was more likely a desperate rather than an intentional act: he was trying to keep the gang members at bay and

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[1] The State's suggestion that respondent's failure to object at trial should be a factor in barring federal habeas corpus relief is meritless, given the state appellate court decision on the merits. See Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981), cert. denied, ____ U.S. ____, 71 L.Ed.2d 666 (1982); see also Engle v. Isaac, ____ U.S. ____, 71 L.Ed.2d 783, ____ n.44 (1982); Castaneda v. Partida, 430 U.S. 485, n.4 (1977). In any event, the concurring judge below concerned about the lack of objection, nevertheless found that the error here was "far more potent" than the error in Sandstrom.

may well have stabbed Smokey by accident. Indeed, Mr. Ramirez did not testify that he intended to stab Smokey,[2] only that Smokey was stabbed while he was desperately trying to defend himself. But the jury was told that they could presume Mr. Ramirez's intent from the act and its natural consequence, impelling a finding of criminal intent.

To the extent that the prosecution evidence was inconsistent with Mr. Ramirez's testimony, it was fraught with contradictions and uncertainties, and it came from witnesses -- "Cano," "Nandy," and Smokey's wife -- who had strong motives to lie. That they did indeed fabricate or conveniently forget is obvious from Detective Danaher's testimony about the statement of gang members on the night of the incident. Those contemporaneous accounts actually squared with Mr. Ramirez's account of the weapons that were present that night. Moreover, Mr. Ramirez's sister testified that her original testimony against her brother had been coerced by the gang members.

Finally, respondent's acquittal of murder in the second degree does not preclude a finding that the charge was error. This Court in Sandstrom was concerned that a reasonable juror would conclude that criminal intent was proved once the act, here stabbing, was proved. See also, Nelson v. Scully, 672

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[2] Similarly, Mr. Ramirez's statement to Assistant District Attorney Knauer did not contain any admission of intent to kill Smokey. The only such suggestion came in Detective Danaher's testimony, and there is reason to doubt that testimony, for during hours of interrogation, all through a Spanish interpreter, the jury was asked to believe that Mr. Ramirez, who spoke only Spanish, delivered this statement and this statement alone in English. The incredible nature of this testimony did not escape the jurors, for they acquitted Mr. Ramirez of intending to kill Smokey.

F.2d at 272; Washington v. Harris, 650 F.2d at 453. Although he was acquitted of the most serious charge, respondent was still convicted of an intentional homicide, manslaughter in the first degree (intent to cause serious physical injury), and that conviction, too, could have been based upon the presumption. The jury simply may have decided that the "natural and probable consequence" of stabbing Smokey a single time with a kitchen knife was serious physical injury, and that Smokey's death was a somewhat unexpected, i.e., less than probable, result.

The jurors were clearly troubled by this case, for they requested a reading of all the gang members' testimony, as well as Mr. Ramirez's transcribed statement to the assistant district attorney and they deliberated for seven hours. It is therefore impossible to "conclude that the jury ignored the specific, erroneous instructions". United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976). Accordingly, the error was not harmless. Chapman v. California, 386 U.S. 18, 24 (1977); Fahy v. Connecticut, 375 U.S. 85 (1963).

B.

The State also urges review to resolve what it believes is a conflict among the circuits. However, contrary to the State's assertion that "widely disparate analyses" have resulted from this Court's Sandstrom decision, an analysis of the decisions cited by the State -- and others the State has overlooked -- show surprising harmony. In fourteen cases the challenged instructions was phrased permissively and thus

found not to be burden shifting.[3] Of the fourteen cases cited by the State where the challenged instruction was phrased in mandatory presumption language, thirteen found the instruction to be constitutional error.[4] Another case not

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3 United States v. Ming Sen Shiue, 650 F.2d 919 (8th Cir. 1981)("you may consider it reasonable to draw the inference...[but] it is entirely up to you"); United States v. White, 649 F.2d 779 (10th Cir.) cert. denied, ____ U.S. ____, 102 S.Ct. 357 (1981)("you may reasonably draw the inference...."); United States v. Mayo, 646 F.2d 369 (9th Cir.) cert. denied, ____ U.S. ____, 102 S.Ct. 979 (1981)("you may infer..."); Bonnet v. Solem, 640 F.2d 125 (8th Cir. 1981)("you may consider...."); Nelson v. Solem, 640 F.2d 133 (8th Cir. 1981)("design to effect death may be inferred...[but you are] at liberty to infer or not to infer...."); United States v. Caucci, 635 F.2d 441 (5th Cir. 1981)("it is ordinarily reasonable to infer...."); United States v. Tecumseh, 630 F.2d 749 (10th Cir.) cert. denied 449 U.S. 961 (1980)("you may find from the use of such weapon...the existence of malice...[but] you are not obligated so to find...."); United States v. Ciampaglia, 628 F.2d 632 (1st Cir.) cert. denied, 449 U.S. 956 (1980)("you may infer [knowledge]...[but] it is entirely up to you...."); United States v. Ross, 626 F.2d 77 (9th Cir. 1980)("you may consider it reasonable to draw an inference...."); McInerney v. Berman, 621 F.2d 20 (1st Cir.) cert. denied, 449 U.S. 867 (1980)("malice...may be implied" or "inferred"); United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980) cert. denied, 450 U.S. 910 (1981)("it is reasonable to infer...."); United States v. Ogle, 613 F.2d 233 (10th Cir. 1979) cert. denied, 449 U.S. 825 (1980)("acts may indicate intent" and "it is reasonable to infer...."); United States v. Ariza-Ibarra, 605 F.2d 1216 (1st Cir. 1979) cert. denied, ____ U.S. ____, 102 S.Ct. 392 (1981)("it is reasonable to infer...."). One additional case not cited by the State reaches the same conclusion: United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979)("it is reasonable to infer....").

Another case, Gagne v. Meachum, 602 F.2d 471 (1st Cir.) cert. denied, 444 U.S. 992 (1979), found the term "the rational probability" also to be permissive.

4 Arroyo v. Jones, 685 F.2d 35 (2d Cir. 1982) cert. pending sub nom Jones v. Arroyo, No. 82-521; Rivera v. Coombe, 683 F.2d 697 (2d Cir. 1982); Mancuso v. Harris, 677 F.2d 206 (2d Cir. 1982) cert. pending, No. 82-5239; Nelson v. Scully, 672 F.2d 266 (2d Cir. 1982); United States v. Williams, 665 F.2d 107 (6th Cir. 1981); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981); McGuinn v. Christ, 657 F.2d 1107 (9th Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1618 (1982); Washington v. Harris, 650 F.2d 447 (2d Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1455 (1982); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981) vacated on other grounds, ____ U.S. ____, 102 S.Ct. 2026 (1982); Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980); Harless v. Anderson, 664 F.2d 610 (6th Cir. 1981)(as amended, March 8, 1982).

cited by the State, Mason v. Balkcom, 669 F.2d 222 (5th Cir. 1982)(cert. pending), reaches the same conclusion.[5]

The divergence occurs appropriately -- when each court considers whether the offending charge was harmless in the context of a particular case. In the thirteen cases where the charge was found to be constitutional error, four were denied relief because of procedural problems,[6] six more were denied relief either because the balance of the charge cured the error or because, in the context of the case, the error was

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[5] The holdings in eight other cases cited by the State are not based on Sandstrom error and thus are not relevant to this case. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981)(death penalty hearing process flawed by instruction which precluded jury from considering non-statutory mitigating factors); Martin v. Warden, 653 F.2d 799 (3d Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1019 (1982)(charge regarding application of facts to felony murder statute was correct); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981)(self-defense charge shifted burden of persuasion to defendant and error was not harmless); Mitchell v. Engle, 634 F.2d 353 (6th Cir. 1980)(forcing defendant to wear jail clothing did not require a new trial since there was overwhelming evidence of guilt); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) cert. denied, 451 U.S. 1028 (1981)(Georgia statute defining self-defense as an affirmative defense unconstitutionally shifted the burden of proof); Baker v. Muncey, 619 F.2d 327 (4th Cir. 1980)(charge that delivering a mortal wound with a deadly weapon "throws upon slayer the necessity of showing extenuating circumstances" is burden shifting); United States ex rel. Goddard v. Vaughn, 614 F.2d 929 (3d Cir.) cert. denied, 449 U.S. 844 (1980)(state statute requiring defendant to prove voluntary intoxication by a preponderance is constitutional, since such evidence is not considered until after the state has proved its case); United States v. Meadows, 598 F.2d 984 (5th Cir. 1980)(new trial granted where fraud instruction understated applicable law).

[6] Burton v. Bergman, 649 F.2d 428; Tyler v. Phelps, 643 F.2d 1095; Dietz v. Solem, 640 F.2d 126; Mays v. Balkcom, 631 F.2d 48.

harmless beyond a reasonable doubt,[7] and three were granted new trials or a modification of the conviction.[8]

Clearly then, the circuits have been largely consistent in interpreting this Court's Sandstrom decision; respondent's case is no exception. The court of appeals correctly found that the charge in his case was constitutional error, that the balance of the charge "greatly exacerbated" the harm, and that the result, in a case where intent was "the crucial" issue, was a violation of due process. There being no significant conflict among the circuits and no important federal issue for

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7 Rivera v. Coombe, 683 F.2d at 700-1 (error cured since charge as a whole emphasized permissive language and analysis of surrounding circumstances; appellant did not deny intent to stab but rather denied the stabbing); Mancuso v. Harris, 677 F.2d at 210-1 (offensive instruction did not occur during charge on burglary, which was the only intent crime of which defendant was found guilty); Nelson v. Scully, 672 F.2d at 272 ("pointed, emphatic, repeated and detailed" instructions on burden of proof, a listing of facts the jury "might 'inferentially' consider," and "hammering" away at permissive language cured the offending language); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981) (error harmless because defendant did not raise lack of intent but rather denied all involvement in crime); McGuinn v. Christ, 657 F.2d 1107 (9th Cir. 1981) (evidence of intent was overwhelming, so charge error was harmless beyond a reasonable doubt); Washington v. Harris, 650 F.2d 447 (mandatory language delivered during instructions on manslaughter count and, since defendant was convicted of higher murder count, where intent instruction was phrased permissively, the error may have been harmless).

In the one case where a charge phrased in mandatory language was not labeled error, the court appears merely to have telescoped the discussion of the challenged language itself into its analysis of the charge as a whole. In Jacks v. Duckworth, 651 F.2d 480, 485-6 (7th Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1010 (1982), the court noted "the absence of mandatory effect" and "qualifying phrases which nullified the mandatory flavor" to support its finding that the charge as a whole was permissive.

8 Arroyo v. Jones, 685 F.2d 35; Mason v. Balkcom, 669 F.2d 222; United States v. Williams, 665 F.2d 107.

this Court to resolve, the State's petition for a writ of certiorari should be denied.

CONCLUSION

THE STATE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Attorney for Respondent

JUDITH L. TURNOCK
Of Counsel
October 28, 1982

Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-584

E.W. JONES,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF
JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Felix Ramirez, respondent herein, respectfully applies for leave to proceed in forma pauperis upon his opposing the State's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. In the New York State and federal trial and appellate courts, respondent was allowed to proceed as a poor person and was represented by The Legal Aid Society of New York. Such counsel have agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of the within application is annexed hereto.

Dated: New York, New York
October 27, 1982

Respectfully submitted,

JUDITH L. TURNOCK
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IN THE

SUPREME COURT OF THE UNITED STATES

October 1982

No. 82-584

E.W. JONES,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS UPON OPPOSING THE STATE'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Felix Ramirez, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis upon the filing of the attached Brief in opposition to the State's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding are true:

1. I am presently unemployed, having been released from prison on August 9, 1982.

2. During the calendar year 1981, I earned approximately $100 as an inmate in a state facility.

3. I have no savings account.

4. I do not own any real estate, stocks, bonds, notes,

automobiles, or other valuable property.

5. I am responsible for my own support and for that of my wife and infant daughter.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Felix Luis Ramirez
FELIX RAMIREZ

Sworn to before me this

21 th day of October, 1982

Claudia Van Wyk
NOTARY PUBLIC

CLAUDIA VAN WYK
No. 4733225
County of New York
Commission Expires 3/30/84